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No. 88-902, No. 88-929

In The

Supreme Court Of The United States

October Term, 1988

JOHN A. BERSANI, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Repondents.

JOSEPH ROBICHAUD, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petitions For Writs of Certiorari
To the United States Court of Appeals
For The Second Circuit

BRIEF FOR RESPONDENTS CONSERVATION LAW FOUNDATION OF NEW ENGLAND, *ET AL.*, IN OPPOSITION

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LIST OF PARTIES

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STATEMENT OF THE CASE

A. Introduction

This case involves challenges to the decision of the U.S. Environmental Protection Agency ("EPA") to prohibit the construction of a shopping mall by petitioners Bersani *et al.* ("Pyramid") in a Massachusetts wetland known as Sweedens

Swamp. Using the authority granted to it in § 404(c) of the Clean Water Act, 33 U.S.C. § 1344(c), EPA determined that filling Sweedens Swamp would have unacceptable adverse effects on wildlife, effectively vetoing a permit that the U.S. Army Corps of Engineers ("the Corps") proposed to issue to Pyramid for the mall. EPA's action was upheld by the United States District Court for the Northern District of New York, 674 F. Supp. 405 (N.D.N.Y. 1987), and affirmed on appeal by the United States Court of Appeals for the Second Circuit. 850 F.2d 36 (2d Cir. 1988).

EPA's action reflected the fundamental purpose of § 404 of the Clean Water Act: to protect wetlands from unnecessary destruction. The principal goal of the § 404 program is to keep development out of wetlands if it can occur on upland sites and still fulfill project purposes. *See* 40 C.F.R. § 230.10(a). EPA's decision to prohibit filling Sweedens Swamp was based upon its finding that Pyramid had ignored an available upland site where its project could have been built, averting serious adverse impacts upon wildlife dependent upon the swamp for habitat.

Pyramid now seeks to argue to this Court that it should not be held responsible for its decision to bypass the alternative site because, by the time it submitted its permit application, that site had fortuitously been acquired by another developer.[1] EPA determined, however, that its regulations required consideration of

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[1] Ironically, after arguing strenuously to the Corps and EPA that the upland site in question was unsuitable for its project, Pyramid is itself now constructing a major shopping mall on that site as part of a joint venture with the other developer. Respondents Conservation Law Foundation of New England *et al.* learned of Pyramid's decision to build a mall on the alternate site through news reports while the parties' respective motions for summary judgment were pending before the district court. Affidavits subsequently filed by Pyramid in response to respondents' discovery requests averred that Pyramid still needed the § 404 permit at issue in this litigation, but did not say whether the mall described in its permit application would still be built at the Sweedens Swamp site. Since the joint venture agreement between Pyramid and the other developer was at that time still in draft form, respondents did not argue that the case was moot. Respondents are now seeking further information on the status of the joint venture and Pyramid's plans for Sweedens Swamp.

alternative sites available to Pyramid during its planning process, at the time of "market entry," when it could most readily avoid siting its project in a wetland. EPA's interpretation of its own regulations on this point was upheld by the district court and the court of appeals.

As the courts below found, EPA's protection of Sweedens Swamp was reasonable and consistent with EPA's regulations, its wetland protection policy, its statutory authority under § 404(c), and the overall objectives of the Clean Water Act. The aspect of EPA's decision for which *certiorari* is sought is, moreover, narrowly addressed to the unusual circumstances of this case, in which an available upland site ignored by the permit applicant during its project planning fortuitously became unavailable prior to submission of the formal permit application. For these reasons, respondents Conservation Law Foundation of New England *et al.*, thirteen nonprofit state and national conservation organizations,[2] submit that further review by this Court is not warranted.

B. Statutory and Regulatory Framework

The Clean Water Act, enacted in 1972, sets forth a bold objective of maintaining and restoring the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). Responsibility for administering the Act lies with EPA except as otherwise expressly provided. 33 U.S.C. § 1251(d).

Section 404 of the Act, 33 U.S.C. § 1344, creates a permit program for any discharge of dredged or fill material into the waters of the United States, including wetlands. Congress divided the responsibilities for administering § 404 between EPA and the U.S. Army Corps of Engineers (the "Corps"). It placed the actual

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[2] Respondents include the Conservation Law Foundation of New England, the Sierra Club, the Environmental Defense Fund, the National Wildlife Federation, the Massachusetts Wildlife Federation, the National Audubon Society, the Massachusetts Audubon Society, Citizens for Responsible Environmental Management, the Massachusetts Association of Conservation Commissions, the Massachusetts Society for Conservation Professionals, the Audubon Society of Rhode Island, the Rhode Island Association of Conservation Commissioners, and the Natural Resources Defense Council. None of these organizations has a corporate parent, subsidiaries, or any publicly held stock.

permitting authority with the Corps, but in considering permit applications the Corps must apply guidelines promulgated by EPA, in consultation with the Corps, pursuant to § 404(b). These "guidelines" are in fact regulations binding on the Corps and the public. *See* 33 U.S.C. § 1344(b)(1); 33 C.F.R. § 323.6(a).

A basic policy of the EPA guidelines is that wetlands not be needlessly destroyed. The guidelines forbid destruction of wetlands, which are "special aquatic sites," 40 C.F.R. §§ 230.3(q-1), 230.41, if there is a practicable alternative. § 230.10(a). Where the activity is not water-dependent, *i.e.*, where the activity "does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic project purpose," such alternatives are presumed to exist unless the permit applicant clearly demonstrates otherwise. *Id.*

Although the Corps has the initial permitting authority for § 404, EPA exercises a "veto power" under § 404(c). Under this exclusive authority, EPA may deny or restrict the use of any area for disposal of dredged or fill material whenever it determines that such disposal "will have unacceptable adverse effect" on specified natural values, including wildlife. 33 U.S.C. § 1344(c). Section 404(c) empowers EPA to prohibit filling a wetland even after the Corps issues a permit authorizing disposal at that site.

C. Factual and Procedural Background

Sweedens Swamp is a New England red maple swamp, some 50 acres in size, located at the intersection of two major highways in Attleboro, Massachusetts. The swamp has been found to provide "excellent wildlife habitat" by EPA, the U.S. Fish and Wildlife Service, the Corps, and the state wildlife agency. JA 41, 140, 320.[3]

In 1984 Pyramid submitted an application to the Corps for a § 404 permit to fill large portions of the site for a proposed shopping mall. In its application and supplemental application, Pyramid insisted that marketing considerations rendered alternative sites in the area, particularly one nearby in North Attleboro,

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[3] References to the Joint Appendix filed in the court below are as follows: "JA ___." References to the Appendix filed with Pyramid's Petition are as follows: "App. A___."

Massachusetts where another developer proposed to build a similar shopping mall, infeasible for its project. Pyramid stated that it would not accept the North Attleboro site even if it were offered "for free," with all necessary permits and approvals. JA 361. Because recent changes in that site's zoning had facilitated its use for a shopping mall, Pyramid also insisted -- in sharp contrast to the argument it now advances -- that the practicability of alternative sites be measured, not as of the time it submitted its application, but at an earlier time when it was making its siting decision. JA 374.

Finding that Pyramid had failed to demonstrate that alternative upland sites for its project were unavailable, the Corps' regional office recommended denial of the permit. JA 209. That recommendation was overruled by the Corps' Director of Civil Works, who embraced a novel theory, abandoned by Pyramid in this litigation, that Pyramid could eliminate the adverse effects of the project on Sweedens Swamp by constructing an artificial wetland elsewhere. JA 109. Under direction from Corps headquarters, the Corps' regional office proposed to issue the § 404 permit in June 1985.

In July 1985 EPA commenced veto proceedings pursuant to § 404(c). Following public hearings and opportunity for comment, EPA's Assistant Administrator for External Affairs issued a Final Determination in May 1986, prohibiting the project because it would have unacceptable adverse impacts on wildlife. App. C. Like the Corps' regional office, EPA found that Pyramid had failed to demonstrate that alternative sites were not available for its project. As EPA noted, "The uncontested fact is that Pyramid never checked the availability of the North Attleboro site during its investigation of the market, notwithstanding its knowledge that Sweedens Swamp suffered from significant environmental constraints." App. C 94a.[4] EPA rejected Pyramid's contention that the current unavailability of the North Attleboro

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[4] The North Attleboro site had been purchased by another developer in 1983, during the approximate period when Pyramid was evaluating the market for a location for its own project. The record submitted by Pyramid was ambiguous, at best, concerning whether Pyramid had begun investigating the Attleboro real

site shielded it from responsibility for its decision to bypass an upland site during its planning process, ruling that the availability of alternatives to the applicant should under these circumstances be assessed as of the time it made its siting decision (as Pyramid had earlier advocated with respect to the practicability of such alternatives). *Id.* 92a-93a.

Because filling Sweedens Swamp would inflict serious damage upon wildlife values, and because that damage appeared avoidable, EPA concluded that the wildlife impacts of the project were unacceptable under § 404(c). *Id.* 106a-107a.[5]

Pyramid then commenced this action against the Corps and EPA, challenging EPA's action and seeking to compel issuance of a permit. In October 1987 the district court granted summary judgment to the government and to respondents, who had intervened as defendants. That judgment was affirmed on appeal by the Second Circuit in June 1988.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Nor does the decision of the court of appeals involve an important question of federal law which should be decided by this Court. Accordingly, review by this Court is unwarranted.

1. The Decision of the Court of Appeals is Correct

EPA's decision to prohibit the destruction of Sweedens Swamp, upheld by the court of appeals, was fully consistent with its regulations, its wetlands protection policy, statutory require-

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estate market prior to the purchase of the North Attleboro site. Pyramid refused to provide further information to EPA concerning its market investigation. EPA accordingly concluded that Pyramid had not met its burden under 40 C.F.R. § 230.10(a)(3) of demonstrating that the alternative site had been unavailable. App. C 94a-97a.

[5] EPA also rejected the position of the Corps' Director of Civil Works that an applicant may freely substitute an artificial wetland for a natural one, finding substantial scientific uncertainty regarding the viability of artificial wetlands. App. C 100a-105a.

ments, and the broad objectives of the Clean Water Act. EPA acted to prevent the unnecessary destruction of a wetland for a non-water-dependent project, in conformance with the clear direction of the guidelines it promulgated under the authority of § 404(b)(1) of the Clean Water Act. Those guidelines establish presumptions, rebuttable only by clear evidence from the permit applicant, that alternative upland sites are available for a project such as Pyramid's shopping mall. On the complex administrative record developed during the Corps' permit review and EPA's subsequent § 404(c) proceeding, EPA concluded that Pyramid failed to demonstrate that an alternative site had not been available for its project.[6] Finding that the loss of Sweedens Swamp would entail serious adverse impacts on wildlife, and that those impacts appeared to have been avoidable, EPA quite properly concluded that the adverse impacts on wildlife were unacceptable under § 404(c), effectively vetoing the permit.

Pyramid seeks to argue to this Court that EPA and the court of appeals erred in looking to the period when it selected the site for its project, when an alternative site was available to it. Pyramid contends that the availability of alternatives should have been assessed only as of the later time when it filed its permit application, after the upland alternative site had fortuitously been purchased by another developer. As the court of appeals correctly found, however, EPA acted reasonably in looking to the time period when actual siting decisions were made by the applicant, since that is the time when the applicant can most readily avoid needless location of its project in a wetland. Interpretation of EPA's guidelines to extend to the site-decision period thus directly

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[6] Contrary to Pyramid's contention, EPA's finding on this point did not violate its burden of proof under § 404(c). EPA's responsibility in invoking its authority under § 404(c) is to justify its action. *See* 45 Fed. Reg. 85,336, 85,338 (1980). That responsibility does not alter the substantive burden placed by the guidelines on a permit applicant to "clearly demonstrate" that practicable alternatives are unavailable. 40 C.F.R. § 230.10(a)(3). Failure by an applicant to sustain that burden in its application plainly provides an appropriate basis for EPA to veto a proposed permit. EPA's Final Determination clearly states the basis for its action in this case, and fully satisfies its burden.

furthers the guidelines' underlying policy, which is to steer private development away from wetlands wherever possible. Pyramid itself had earlier argued strenuously to the Corps that the practicability of alternatives should be assessed as of the time of its site decision, rather than as of the later time of permit application, on the grounds that to do otherwise would be fundamentally unfair to the developer. JA 374. Thus, the decision of the court of appeals was correct, and, as it does not conflict with the decision of any other court of appeals, does not warrant this court's review.

2. Pyramid's Petition Does Not Raise an Important Issue of Federal Law

Even apart from the correctness of the decision below, the Court should note that the decision involves a very narrow issue, applicable only in the highly unusual circumstances of this case. EPA expressly limited its decision to the circumstance where a developer enters the market area for the accomplishment of a specific project; it did not address, and the court of appeals decision should not be read as extending to, the relevant time period for analysis of alternatives under other circumstances, as where an applicant wishes to build upon property acquired or inherited long before. App. C 93a. Even with respect to applications from developers entering a new market, analysis of alternatives at the time of market entry will affect applicants only under the most unusual of circumstances: only where an available upland alternative ignored by a developer becomes unavailable fortuitously prior to actual submission of the permit application, and only where there are no *other* alternative sites for the project at the time of application.[7]

Contrary to the ominous claims of Pyramid and *amici*, therefore, the court of appeals' decision will have little effect on the normal processing of § 404 applications. Few applications, if any,

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[7] Respondents note that the administrative record in this case indicates that several other alternative sites exist for Pyramid's project, apart from the North Attleboro site whose availability is at issue in this litigation. JA 161, 168-71. The availability of other alternative sites would support a decision by EPA to prohibit this project even if this Court were to reverse the court of appeals regarding the availability of the North Attleboro site.

will duplicate the factual circumstances of this case. Nor will the court of appeals' decision create "chaos" within the development community, as broadly asserted by Pyramid and *amici*. That needless destruction of wetlands should be avoided wherever possible is already well-established in the § 404 program, and should surprise no one. The application of that principle in this case is readily comprehensible: when a developer enters a market to build a project, it must consider upland locations for its project during the planning leading up to its selection of a site, and should locate the project in a wetland only if no upland sites are available.

Pyramid also errs in claiming that EPA's decision was inconsistent with prior administrative practice. Precisely because the question raised in this case will occur only under highly unusual factual circumstances, neither EPA nor the Corps have ever had occasion before this case to address the proper time period in which to assess the availability of alternatives to an applicant. To the extent they involved the question of availability of alternatives, the judicial decisions and prior § 404(c) veto proceedings cited by Pyramid all involved circumstances where alternative upland sites were plainly available at the time of application. Pyramid's repeated contention that the Corps and EPA had previously looked to the period of permit application is thus meaningless, for neither agency had previously confronted the timing issue.

Pyramid is equally in error in suggesting, without the slightest support, that the Corps of Engineers disagrees with EPA over this issue. While EPA quite plainly disagreed with the Corps over its decision to grant a permit to Pyramid, that disagreement was over entirely different issues than those raised by the petitioners in this action. Both EPA and the Corps are parties to this action, and have joined in defending EPA's decision on this point. The Justice Department attorney representing the government on appeal stated unequivocally to the court of appeals that he represented the Corps and that the Corps joined fully in the briefs submitted to that court.

The principle that Pyramid would have this Court review is thus a narrow one, addressed to specific and unusual factual circumstances, and developed by EPA quite properly through the

adjudication of the particular case where these circumstances were found to exist. The question Pyramid raises thus falls far short of the significance of the questions presented in cases, such as those cited by Pyramid itself, where this Court has granted review to decide issues central to entire regulatory programs. *See, e.g., Commonwealth of Pennsylvania v. Union Gas Company*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted*, ___U.S.___, 108 S. Ct. 1219 (1988) (*certiorari* granted to determine whether private parties may sue states in federal court to recover cleanup costs under the Superfund law); *Tull v. United States*, ___U.S.___, 107 S. Ct. 1831, 1835 (1987) (*certiorari* granted to resolve conflict among courts of appeals regarding whether a jury trial is required to establish liability and assess penalties for violation of § 404 of the Clean Water Act); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) (*certiorari* granted to determine validity of Corps' regulations defining "adjacent wetlands" as "waters of the United States" under the Clean Water Act); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) (*certiorari* granted to review validity of EPA's "bubble concept" under the Clean Air Act). Accordingly, Pyramid's petition does not raise an issue of federal law of sufficient import to warrant review by this Court.

3. The Question Presented by Robichaud *et al.* Plainly Does Not Warrant This Court's Review

The argument presented by petitioners Robichaud *et al.* is of even less consequence than that raised by Pyramid, and was properly rejected by the court of appeals. Robichaud *et al.* contend that EPA erred in taking into consideration the widespread destruction of wetland habitat throughout Massachusetts and the northeastern United States in finding the impacts of Pyramid's proposed mall on wildlife unacceptable. Robichaud *et al.*'s argument is plainly erroneous, and unworthy of this Court's attention. Nothing in the language of § 404(c) so illogically restrains EPA. Indeed, it is difficult to envision how EPA could possibly evaluate the ecological significance of wildlife impacts in order to determine if those impacts are "unacceptable" without considering the context in which those losses take place. To take obvious examples, how could EPA assess the significance of destruction of

specific habitat for a species without considering whether that species is endangered, or otherwise under stress within its range? Similarly, how could EPA assess the relative value of the habitat provided by a particular parcel of wetlands without considering the surrounding area? Fifty acres of swamp might not be significant in the context of Florida's Everglades, but in the increasingly urbanized Northeast it may represent a precious oasis of wildlife habitat, as EPA found here.

The contention of Robichaud *et al.* that EPA must blind itself to every consideration of ecological context in invoking its powers under § 404(c) is thus wholly without merit, and does not deserve this Court's attention.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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